BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA WEATHERFORD Claimant	)	
VS.	)	Docket No. **1,058,469**
U.S.D. #229 Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the December 29, 2011 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant tripped and fell while walking to a parking lot to help load educational materials into a teacher's car. Respondent denied the accidental injury arose out of and in the course of claimant's employment. Respondent specifically argued there was no causal connection between the conditions under which the work was required to be performed and the resulting accident; that walking is a day-to-day activity; and the fall was the result of a neutral risk.

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of her employment. Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment. Claimant argues the ALJ's Order should be affirmed.

The issues respondent raised on this appeal from a preliminary hearing include: (1) whether claimant suffered personal injury by accident arising out of and in the course of her employment with U.S.D. 229; (2) whether claimant's accidental injury with U.S.D. 229 arose as the result of an activity of day-to-day living; (3) whether claimant's accidental injury with U.S.D. 229 arose as the result of a neutral risk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant has been employed as a student service consultant for 38 years. Her job is to consult with teachers regarding material for special education curriculum. She is located at the Blue Valley Service Center at 151st and Metcalf.

Claimant described her September 27, 2011, accident:

> I was walking out of the building with the teacher that had asked me for materials for a student that she works with. We were taking the materials to her car. We were walking out of the Blue Valley Service Center together at a pretty fast pace and talking with each other, facing each other. As a consultant, I need to talk with teachers and find out what their needs are. I was asking her how the year was going, how her students were doing, what her needs were. So we were talking to each other and my shoe hit the ridge of the concrete and the next thing I knew, I had fallen and I was on the ground.[1]

Claimant testified that it was about 3 p.m. when the accident occurred and her work shift ends at 4 p.m. Claimant offered to help the pregnant lady load the heavy materials in her car.

> We were walking at a fast pace and I wasn't really paying attention to where I was going because I was facing her and we were talking, and my shoe hit the ridge in the concrete where the forms, when concrete is laid there's forms, and the ridge was extended and I hit the ridge with my shoe. I actually have my shoe.[2]

On cross examination, claimant testified that she intended to help the pregnant teacher load the supplies from the cart to the car. Respondent did not ask claimant to help this teacher take her materials to her car. But claimant testified that she does this type of duty on a regular basis and was something required of her.

Claimant testified:

> Q. But it's not something that is required of you. Would you agree with that?
>
> A. You know, I think it would be required of me. As part of my job I need to get materials to teachers.
>
> Q. She was pulling the cart at the time that this accident happened.
>
> A. Yes.

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[1] P.H. Trans. at 5.

[2] *Id.* at 7.

> Q. Nobody required you to assist her out to the car to do that. I understand you wanted to do that because she was pregnant, but nobody at the district required you to go do that. Would you agree with that?
>
> A. No one required me but I do that with all my teachers that I work with and help them to the car with materials because they are very heavy.[3]

In summary, while claimant was walking to the car to help load educational materials, she hit a ridge of the concrete with her shoe. This caused the sole of her shoe to bend back from the shoe and claimant to trip and fall. Claimant fell onto cement and injured her right elbow, left hand and right hip.

Claimant testified that she did not have any problems with loss of balance or a history of falling. She advised her supervisor that she had fallen and sought medical treatment at OHS. But after a CT confirmed that claimant had fractured her pelvis, claimant stopped receiving benefits. So she sought additional medical treatment on her own with Dr. Sharp who then referred her to Dr. David Clymer.

Dr. Clymer prescribed pain medication and physical therapy. At her last appointment with Dr. Clymer on December 21, 2011, claimant was released to return to work. Claimant had been off of work from the date of accident through December 21, 2011. Claimant opined that she is not able to return to full-time work. She doesn't have the stamina and endurance like she did before the accident. And by the end of the day, her pain has increased in her lower back and tail bone area. At the time of the preliminary hearing, claimant was still undergoing physical therapy and was being treated by Dr. Clymer.

The 2011 legislative session resulted in amendments to the workers compensation act including definitions regarding whether an accident is deemed to have arisen out of and in the course of employment. L. 2011, Ch. 55, Sec. 5 provides in pertinent part:

> (f) (2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include: (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living; (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character; (iii) accident or injury which arose out of a risk

[3] P.H. Trans. at 16.

> personal to the worker; or (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Initially, respondent argues there was no causal connection between the conditions under which claimant's work was required to be performed and the resulting accident. Claimant was hurriedly accompanying a teacher to her car in order to help load the heavy educational materials into the teacher's car. When the accident occurred, claimant was performing an activity which she considered a part of her job and, at a minimum, was a permissible activity. The ALJ analyzed the facts and concluded:

> At the time of the injury the claimant was engaged in activity connected with her employment. Although she was not expressly required to help the teacher load materials in her car, it was certainly permissible for the claimant to do so. At the time of the accident the claimant was in the particular area and its particular conditions because of her job. The facts satisfied the requirements of K.S.A. 44-508(f)(2)(B).

This Board member agrees and affirms.

Respondent next argues that walking down a sidewalk is a normal activity of day-to-day living and since claimant was simply engaged in walking down the sidewalk when she fell, her claim is not compensable.

The phrase "normal activities of day-to-day living" was included in Kansas Workers Compensation definition statutes before the recent statutory amendments.[4] And that statutory language has been construed by the Kansas appellate courts before the recent statutory amendment.[5] The recent statutory amendments contain the same phrase "normal activities of day-to-day living."[6] And when the legislature fails to modify a statute to avoid judicial construction of the statute, the legislature is presumed to agree with the court's interpretation.[7]

In *Bryant*[8] the issue was whether an accident was work related or a natural consequence of an activity of day-to-day living. The Supreme Court noted the proper

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[4] See K.S.A. 2010 Supp. 44-508(e).

[5] *Bryant v. Midwest Staff Solutions, Inc.*, 292, Kan. 585, 257 P.3d 255 (2011).

[6] L. 2011, Ch. 55, Sec. 5(f)(3)(A)(i)

[7] *State v. Rollins*, 264 Kan. 466, 957 P.2d 438 (1998); *Windle v. Wire*, 179 Kan. 239, 294 P.2d 213 (1956).

[8] *Bryant v. Midwest Staff Solutions, Inc.*, 292, Kan. 585, 257 P.3d 255 (2011).

approach was to focus on whether the injury occurred as a consequence of an event specific to the requirements of performing the job. The Court stated:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [sic] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement bending, twisting, lifting, walking, or other body motions but looks to the overall context of what the worker was doing welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[9]

Walking to deliver and unload the educational material in the teacher's car was inherent and connected to the performance of claimant's job. When claimant tripped she was engaged in the performance of her work-related activities and consequently L. 2011, Ch. 55, Sec. 5(f)(3)(A)(i) is not applicable.

Finally, respondent argues that claimant's fall was the result of a neutral risk and not compensable. Simply stated, a neutral risk encompasses a situation where there is no explanation for the cause of the accident, i.e. it is neither personal to the claimant or caused by employment. In this case the claimant tripped on the concrete and fell. Her fall was not unexplained. The ALJ noted:

> "Neutral risk" was a case law concept for accidents which occurred from no specific cause, typically because the employee didn't know or couldn't remember what caused them to fall, see *Toumi v. Senne & Company, Inc.*, W.C.A.B. 237,798 (1999), *Davis v. Montgomery Ward*, W.C.A.B. 220,775 (1997). The court thinks the intent of K.S.A. 44-508(f)(3)(A)(ii) was to address the case law concept of neutral risk, which meant an unknown risk rather than a commonly occurring risk.
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> In the present case, the risk was known and was the gaps in walking surface caused by concrete expansion joints. It was a risk present at the claimant's workplace as well as many other places, but it was not a "neutral risk." The K.S.A. 44-508(f)(3)(A)(ii) exclusion does not apply either.

This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[9] *Id.* at 596.

[10] K.S.A. 44-534a.

as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 29, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kathleen A. McNamara, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge

[11] K.S.A. 2010 Supp. 44-555c(k).